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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA,
Petitioner,

v.

FELIX HUMBERTO BRIGNONI-PONCE,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

I.

Whether consistent with the Fourth Amendment armed Border Patrol officers operating as a roving

patrol have the right to forcibly stop a vehicle travelling on an interstate highway 60 miles from an international border and to interrogate its occupants absent probable cause, a warrant, or founded suspicion?

II.

Whether the stop of respondent's vehicle and subjection of the occupants to interrogation solely because the occupants appeared to be of Mexican descent violated the Fourth and Fifth Amendments?[1]

STATEMENT OF THE CASE

Facts

During the hours of darkness on 11 March 1973 somewhere near the San Clemente Border Patrol checkpoint, located midway between San Diego and Los Angeles, Border Patrol Agents Brady and Harkins were sitting in a vehicle observing northbound traffic on Interstate Highway 5. (A.[2] 5-7). Their vehicle was at a ninety-degree angle to the highway with the headlights turned on to shine in the cars that passed. (A. 9). The

[1] This was the principal issue presented by the respondent to the Court of Appeals, No. 73-2161 Brief for Appellant, p. 1. Respondent may urge other distinct grounds in support of the judgment of the Circuit Court of Appeals. *United States v. Ballard*, 322 U.S. 78, 88 (1944). See also Stern and Gressman, *Supreme Court Practice*, 314-315 (4th ed. 1969).

[2] "A." refers to Appendix. "Tr." refers to the Trial Transcript. "R." refers to Clerk's Record or official papers.

officers, observing that the people inside the respondent's car appeared to be of Mexican descent, pursued the respondent's vehicle and stopped it. (A. 7, 9). The sole basis for the stop, according to the agents, was that the occupants appeared to be of Mexican descent. (A. 9). Agent Harkins approached the driver's side, and Agent Brady stood back by the right rear portion of the vehicle to provide protection for Harkins. (A. 7). After Agent Harkins approached the driver, Agent Brady on the righthand side of the car identified himself as an immigration officer and asked the occupants in English their citizenship. Apparently they did not understand. (A. 9). Brady then spoke to the two occupants in Spanish, questioned them as to their citizenship, and asked for but did not receive "papers." (A. 7). Thereafter the respondent standing at the rear of the vehicle with Agent Harkins was given his *Miranda* rights and taken into formal custody along with the passengers. (A. 8).

Trial in the District Court

In the Southern District of California in a two-count indictment, the respondent was charged with the unlawful transportation of two illegal aliens, Elsa Marina Hernandez-Serabia (Count One) and Jose Nunez-Ayala (Count Two) in violation of 8 U.S.C. 1324(a)(2). (R. 1-2). During the jury trial Jose Nunez-Ayala and Elsa Marina Hernandez-Serabia were called as Government witnesses and testified that they were born in Mexico and Guatemala, respectively, and had entered the United States illegally on 11 March 1973 (Tr. 24-27, 57, 63-65). Both gave testimony used by the Government in addition to other statements

attributed to respondent that when the vehicle that respondent was driving was just about to be stopped he said, "Well, they busted us." (Tr. 33-34) or "Here comes the immigration." (Tr. 70, 107). On cross-examination the respondent denied that he made such statements to the aliens. (Tr. 91). Both aliens gave testimony relating to the apparently false immigration papers used to gain entry into the United States. (Tr. 25-26, 64-65). The prosecutor cross-examined the respondent as to the Mexican and American money on his person at the time he was arrested, and the next question of the prosecutor challenged the respondent's statement that he had not been in Mexico since 1970. (Tr. 90). The jury returned a verdict of guilty as to both counts, and the district court sentenced the respondent to a period of four years confinement followed by five years probation. (A. 11-12). The motion to suppress the aliens found in the stop of the respondent's car was heard at the time of trial and denied. (A. 10).

Court of Appeals

On 22 May 1973 an appeal was taken to the United States Court of Appeals for the Ninth Circuit. On 23 October 1973 this case with several other cases relating to *Almeida-Sanchez v. United States*, 213 U.S. 266 (1973), was scheduled for an *en banc* consideration by the thirteen active circuit judges. On 14 June 1974 based upon the decision of this Court in *Almeida-Sanchez* and other well-established precedent, the Court of Appeals, well attuned to the problems of law enforcement in the handling of aliens, *unanimously* reversed the conviction because to justify

a stop there must be at least "founded suspicion." *United States v. Brignoni-Ponce*, 499 F.2d 1109 (9th Cir. 1974). Other *en banc* decisions of that Court relating to stop and searches of vehicles for aliens were *United States v. Bowen*, 500 F.2d 960 (9th Cir. 1974) (checkpoint search); *United States v. Peltier*, 500 F.2d 985 (9th Cir. 1974); (*Almeida-Sanchez:* new rule or old rule), and *United States v. Morgan*, 501 F.2d 1351 (9th Cir. 1974) (search at San Clemente checkpoint not functional equivalent of border). This Court granted certiorari in *Bowen* (No. 73-6848), *Peltier*, (No. 73-2000), and *United States v. Ortiz*, (9th Cir. unpublished memorandum) (checkpoint search) (No. 73-2050). These other opinions were the subjects of substantial divergence of opinion of the circuit judges of the Ninth Circuit, but the stop and interrogation of the respondent without probable cause, founded suspicion, or a warrant of any type was condemned by *all* active circuit judges. The Court of Appeals rejected the Government's overly broad authority of 8 U.S.C. 1357(a)(1) as inconsistent with the well-established demands of the Fourth Amendment's protection of privacy. Although the Ninth Circuit disagreed with the Tenth, *United States v. Bowman*, 487 F.2d 1229 (10th Cir. 1973), it concurred with the District of Columbia Circuit, *Au Yi Lau v. U.S. Immigration and Naturalization Service*, 445 F.2d 217, 223 (D.C.Cir. 1971), *cert. denied* 404 U.S. 864 (1971), which had relied upon the principles of this Court announced in *Terry v. Ohio*, 392 U.S. 1 (1968).

SUMMARY OF ARGUMENT

I.

Border Patrol officers operating a roving patrol 60 miles north of the Mexican-American border absent probable cause to believe a vehicle contains illegal aliens lack authority to forcibly stop a moving vehicle travelling on an interstate highway and to interrogate the occupants.

A. Since 1862 federal legislation regulating the entry of aliens has always manifested a Congressional concern to insure those enforcing immigration laws adhered to the principles of the Fourth Amendment. The "Coolie Trade Act" of 1862 empowered federal officers to "examine" American ships anywhere if they had "reasonable cause" to believe "coolies" were on board. In 1875 the first laws restricting the entry of aliens limited inspection of vessels arriving at the port, if the collector of the port "shall have reason to believe that any such obnoxious persons [prostitutes or convicts] are on board." The Chinese Exclusion Acts not only required a warrant to arrest a person believed to be an illegal Chinese person (Act of 13 Sept. 1888, ch. 1015, sec. 13, 25 Stat. 479) but later required that the arrest warrant have the written approval of the U.S. District Attorney (Act of 3 Mar. 1901, ch. 845, sec. 3, 31 Stat. 1093). In 1891 Congress empowered immigration officers to take testimony from aliens, and in 1917 this authority was expanded to permit immigrant inspectors "to board and search for aliens any. . . vehicle in which they believe aliens are being brought into the United States." Today this language is retained in 8 U.S.C.

1225(a), but in 1925 Congress granted an exemption from a warrant for this power to board and search vehicles. This power to search in context with other warrant exemptions and its own wording is circumscribed and consistent with a requirement of probable cause. In 1946 Congressional amendment to the 1925 warrant exemption for the search of a vehicle added the "reasonable distance" in lieu of the belief that aliens were being brought into the United States. The 1946 amendment must also be construed consistent with the Fourth Amendment, especially since the basic inspection authority (8 U.S.C. 1225(a)) still limits the search to particular vehicles. Although the Attorney General asked for authority to "stop and search" vehicles, Congress adhered to its original language, "board and search." The term "board" does not imply the authority to "stop," and there is no express Congressional grant of authority to immigration officers to interdict highway traffic. The legislative history of the section 235(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1225(a), manifests a Congressional concern to limit at the port of entry indiscriminate questioning of citizens, which would be much less warranted on an interior interstate highway. Where the agents thought the occupants to be of Mexican descent, there was not even minimal compliance with the statute that the person to be interrogated be a "person believed to be an alien," because there are too many American citizens of apparent Mexican descent in Southern California to create a justifiable nexus to alienage.

B. Although the stop of respondent's vehicle was a "seizure" under *Terry v. Ohio*, 392 U.S. 1 (1968), the

border patrol officers had no objective articulable facts to justify this forcible intrusion. Hunches of officers, especially on racial or ethnic lines, are insufficient. Although a stop of a person on a street based on a reasonable belief that criminal activity is underfoot (founded suspicion) may be justified, a stop of a moving vehicle on a highway requires probable cause.

C. The concept of area-wide probable cause, especially without a warrant, is inapplicable.

1. The "area-wide equivalent of probable cause" does not, without more, automatically arise in an amorphous zone known as "the area of the Mexican border." *Camara v. Municipal Court*, 387 U.S. 523 (1967), is not comparable, and even assuming that some form of area-wide probable cause might be found, that requirement would need much greater specificity than "the area of the Mexican border."

2. *Camara* requires that where closely regulated area-wide probable cause is applicable, a warrant must be obtained in advance of the intrusion or inspection. The intervention of a neutral judicial officer is necessarily consistent with the Fourth Amendment. The rare situations where neither probable cause nor a warrant are necessary are strictly limited to emergency situations. If a warrant is a prerequisite for health or fire inspection of buildings, then it would be necessary for forcible stops of the travelling public on the highway for interrogation.

D. The alien witnesses, themselves, and their testimony were used against the respondent. The Fourth Amendment excludes verbal evidence as well as physical evidence. Since the respondent's vehicle was stopped, he had standing to object to the result of the unlawful intrusion.

E. *Carroll v. United States*, 267 U.S. 132 (1925), has been consistently followed by this Court so that the result here is not a "new rule." This case involving the application of 8 U.S.C. 1357(a)(1) was one of first impression for the Ninth Circuit which adhered to its earlier precedents requiring at least "founded suspicion" for such a stop.

II.

The only articulated basis for this vehicle stop was that the occupants appeared to be of Mexican descent. The right to travel on the highways without interference from federal officers is a fundamental right of constitutional proportions. Persons of Mexican descent constitute an identifiable group who when subject to invidious discrimination are entitled to equal protection of the laws.

Discrimination on a racial or national basis is prohibited by the Fifth Amendment. Even though the power may be proper on its face, its application against a certain group may be unconstitutional. Distinctions based on "ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." Invidious discrimination by

officers constitutes a defense to the criminal action, and the fruits of the improper stop must be suppressed.

ARGUMENT

I.

ABSENT A WARRANT BORDER PATROL OFFICERS MUST HAVE PROBABLE CAUSE TO FORCIBLY STOP A VEHICLE TRAVELLING ON AN INTERIOR HIGHWAY AND TO INTERROGATE THE OCCUPANTS OF THE VEHICLE.

A. The history of legislation regarding Immigration officer powers does not establish a Congressional abandonment of the requirement of probable cause to forcibly stop a vehicle on an inland highway to conduct an interrogation concerning alienage.

The first federal legislation regulating entry of aliens was the prohibition on the "Coolie Trade" by American citizens in American vessels. Act of 19 Feb. 1862, ch. 27, 12 Stat. 340.[3] These Congressional prohibitions were not so much directed against the Chinese "coolies" as against those who would transport in ships these oriental servants involuntarily held in service or labor. Under Section 6 of the Act of 19 Feb. 1862, ch.

[3] Although this legislation is of ancient origin, it was only recently repealed. Public Law 93-461; 88 Stat. 1387 (20 October 1974).

27, 12 Stat. 341, the President was authorized and empowered:

> "to direct and order the vessels of the United States, and the masters and commanders thereof, to *examine* all vessels navigated or owned in whole or in part by citizens of the United States, and registered, enrolled, or licensed under the laws of the United States, wherever they may be, whenever, in the judgment of such master or commanding officer thereof, *reasonable cause shall exist to believe that such vessel has on board, in violation of the provisions of this Act, any subjects of China known as 'coolies' for the purpose of transportation. . . .*" (Emphasis Added).

Although it might be contended that the power of the United States was sufficient at certain times and places (i.e. at the time of arrival at the port of entry) to examine all vessels, this Congressional authorization empowered federal officers to examine American ships at *any place* but such power was expressly limited to the requirement of reasonable or probable cause to believe that the "coolies" were on board the vessel. The same section appears as section 2163, *Revised Statutes of the United States* (1878 2d ed.) and directed that the examining officer have:

> *"reasonable cause . . . to believe that such vessel has on board any subjects of China, Japan or other oriental country, known as 'coolies'. . . ."* 18 Stat. 377. (Emphasis added).

This section constitutes one of the seven sections (sections 2158-2164) that serve as the first known compilation of the laws relating to Immigration, Title XXIX *Revised Statutes of the United States*, (1878 2d ed.).

The first federal laws restricting entry of the immigrants themselves were promulgated in 1875. Act of 3 Mar. 1875, ch. 141, 18 Stat. 477; see *Kleindienst v. Mandel*, 408 U.S. 753, 761 (1972). The 1875 law prohibited the entry of women for purposes of prostitution or persons convicted of felonious crimes other than political offenses. Again the power to search vessels was restricted:

> "Every vessel arriving in the United States may be inspected under the direction of the collector of the port at which it arrives, *if he shall have reason to believe that any such obnoxious persons [prostitutes or convicts] are on board. . . .*" Act of 3 Mar. 1875, ch. 141, sec. 5, 18 Stat. 477. (Emphasis Added).

The clear intent of the legislation was to empower officers at the port of entry to conduct limited searches for the purpose of excluding designated classes of aliens. By the Act of 3 Aug. 1882, ch. 376, sec. 2, 22 Stat. 214, authorization to board ships arriving at a port of entry was expanded as to the categories of persons to be excluded and granted the power of examination of those on ship. This law provided: "And if on such examination there shall be found among such passengers any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge . . ., and such person shall not be permitted to land." 22 Stat. 214.

Although the Chinese Exclusion Acts initiated in 1882 were not a model of legislation for the "land of opportunity,"[4] these laws contained express statutory

[4] Repealed by Act of 17 Dec. 1943, c. 344, 57 Stat. 600. See also note 25, *infra*.

limitations on the apprehension of those who might be illegal Chinese. These laws set forth the tone of true Congressional concern for the rights of those who might be suspected of being illegal aliens. The procedure for an arrest of such person was spelled out with particularity:

> "That any Chinese person, or person of Chinese descent, found unlawfully in the United States, or its Territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner of the United States court, or before any United States court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came." Act of 13 Sept. 1888, ch. 1015, sec. 13, 25 Stat. 479.

The arrest could be made only after proper issuance of a warrant. Congress later provided additional protection:

> "That no warrant of arrest for violations of Chinese-exclusion laws shall be issued by United States commissioners excepting upon the sworn complaint of a United States district attorney, assistant United States district attorney, collector, deputy collector, or inspector of customs, immigration inspector, United States marshal, or deputy United States marshal, or Chinese inspector, *unless the issuing of such warrant of arrest shall be first approved or requested in writing by the United States district attorney of the district in which*

issued." Act of 3 Mar. 1901, ch. 845, sec. 3, 31 Stat. 1093. (Emphasis added).

Even the formal requirement of a warrant for arrest was further restricted by the additional condition precedent of written approval of the chief federal prosecutor of the district.

In 1891 the first Congressional authorization was passed outlining the powers of immigration inspection officers to inspect alien immigrants at the time of their arrival. Act of 3 Mar. 1891, ch. 551, sec. 8, 26 Stat. 1085. Section 8 provided: "The inspection officers and their assistants shall have power to administer oaths, and to take and consider testimony touching the right of any such aliens to enter the United States, all of which shall be entered of record." 26 Stat. 1085. In 1903 the authority of these immigration officers was expanded:

> "Immigration officers shall have power to administer oaths and to take and consider testimony touching the right of any alien to enter the United States, and, where such action may be necessary, to make a written record of such testimony, and any person to whom such an oath has been administered under the provisions of this Act who shall knowingly or willfully give false testimony or swear to any false statement in any way affecting or in relation to the right of an alien to admission to the United States shall be deemed guilty of perjury and be punished as provided by section fifty-three hundred and ninety-two, United States Revised Statutes." Act of 3 Mar. 1903, ch. 1012, sec. 24, 32 Stat. 1219.

In 1907 this authority was included in a general revision of the immigration laws. Act of 20 Feb. 1907,

ch. 1134, sec. 24, 34 Stat. 906. The same statute even announced that the entry and inspection of aliens along the borders of Canada and Mexico were to be conducted "so as not to unnecessarily delay, impede, or annoy passengers in ordinary travel between the United States and said countries. . . ." Act of 20 Feb. 1907, ch. 1034, sec. 32, 34 Stat. 908. If Congress was then concerned about the fair and unobtrusive contacts of immigration officers at the border, *a fortiori* its concern would be greater for such forcible stops and interrogations over sixty miles from the border.

The general revision of immigration laws in 1917 announced for the first time the right of immigration officers to board and search vessels and vehicles:

> "Immigrant inspectors are hereby authorized and empowered to board and search for aliens any vessel, railway, car, or any other conveyance, or *vehicle in which they believe aliens are being brought into the United States.* Said inspector shall have power to administer oaths and to take and consider evidence touching the right of any alien to enter, re-enter, pass through, or reside in the United States. . . ." Act of 5 Feb. 1917, ch. 29, sec. 16, 39 Stat. 886.[5] (Emphasis added).

In 1925 Congress in an appropriation bill granted immigration officers the power to arrest and search without warrant. Act of 27 Feb. 1925, ch. 364, 43 Stat. 1049-1050. Although Congress excused the requirement of a warrant, the powers to arrest and search were carefully circumscribed:

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[5] As Justice White noted in his dissent in *Almeida-Sanchez*, 413 U.S. 266, 292, this Congressional authorization *and limitation* still exists today as 8 U.S.C. 1225(a). (Sec. 235(a) of the Immigration and Nationality Act of 1952).

"*Provided further*, That hereafter any employee of the Bureau of Immigration authorized so to do under regulations prescribed by the Commissioner General of Immigration with the approval of the Secretary of Labor, shall have power without warrant (1) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission of aliens, and to take such alien immediately for examination before an immigrant inspector or other official having authority to examine aliens as to their right to admission to the United States, and (2) to board and search for aliens any vessel within the territorial waters of the United States, railway car, conveyance, or vehicle *in which he believes aliens are being brought in to the United States;* and such employee shall have power to execute any warrant or other process issued by any officer under any law regulating the admission, exclusion, or expulsion of aliens." 43 Stat. 1049-1050. (Emphasis added).

The power to arrest or take into custody aliens without warrant is limited to violations occurring in the immigration officer's presence or view. This is far more restrictive than the standard authority today granted to federal law enforcement officers to arrest persons for any federal offense committed in their presence or where reasonable cause exists to believe a person has committed a federal felony.[6] The essence of the right

[6]For example, FBI agents today have power to arrest for any federal offense committed in their presence or any federal felony if the agents "have reasonable grounds to believe that the person to be arrested has committed or is committing such felony." 18 U.S.C. 3052.

of immigration officers to forcibly stop vehicles arises out of subsection (2) which permits the boarding and searching for aliens of any vehicle "in which he believes aliens are being brought into the United States." The legislative language clearly suggests that the immigration officers must have a "belief" that aliens are being illegally introduced *into* the United States, which, of necessity, connotes activities at or in the immediate vicinity of an international border. Together subsections (1) and (2), the exceptions excusing a warrant having been so carefully constricted, emphasize the need for immigration officers to secure a warrant in all other circumstances. Again, Congress had anticipated this Court's emphasis on the need for a warrant. *Terry v. Ohio*, 392 U.S. 1, 20 (1968). This last provision of the above cited statute empowered immigration officers to execute "any warrant or other process" which would be necessary in the fair enforcement of the immigration laws. Congress had thus enacted legislation consistent with the Fourth Amendment and the decision of *Carroll v. United States*, 267 U.S. 132 (1925), decided in the same year.

The 1946 amendment, with a dearth of legislative history other than the apparently unopposed request of the Attorney General, modified and expanded the 1925 legislation:

> "Any employee of the Immigration and Naturalization Service authorized so to do under regulations prescribed by the Commissioner of Immigration and Naturalization with the approval of the Attorney General, shall have power without warrant (1) to arrest any alien who in his presence or view is entering or attempting to enter the

United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or any alien who is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the person arrested shall be taken without unnecessary delay for examination before an officer of the Immigration and Naturalization Service having authority to examine aliens as to their right to enter or remain in the United States; (2) to board and search for aliens any vessel within the territorial waters of the United States, railway car, aircraft, conveyance, or vehicle, within a reasonable distance from any external boundary of the United States; and (3) to make arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, or expulsion of aliens, if the person making the arrest has reason to believe that the person so arrested is guilty of such felony and if there is likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be taken without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States; and such employee shall have power to execute any warrant or other process issued by any officer under any law regulating the admission, exclusion, or expulsion of aliens."[7] Act of 7 Aug. 1946, ch. 768, 60 Stat. 865.

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[7]It is anomolous that the Executive (Commissioner and Attorney General) could adopt regulations excusing a warrant leading to a criminal prosecution, when he does not have power to such issue warrants. *Mancusi v. De Forte*, 392 U.S. 364, 371 (1968).

Subsection 1 concerning the power of arrest without a warrant is expanded to "any alien who is in the United States in violation of any such law or regulation." However, the power to arrest is limited to a situation where the alien is likely to escape before a warrant can be obtained for his arrest. Again the Congressional emphasis was placed on a warrant requirement even if an immigration officer had probable cause to believe that the alien was in violation of immigration laws. Subsection (2) is substantially altered. In 1925, the right to board and search the vehicle anywhere in the United States was limited to the vehicle "in which he [the immigration officer] believes aliens are being brought into the United States." The 1946 amendment deletes that requirement and substitutes "within a reasonable distance from any external boundaries of the United States." This legislative amendment can be construed consistent with the Fourth Amendment or taken as a blanket and unlimited authority of the Immigration and Naturalization Service to prescribe regulations that would make legal searches any place within the United States "within a reasonable distance from any external boundary of the United States." This statute has now been construed to be consistent with the Fourth Amendment in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

Almeida-Sanchez was consistent with the previous Congressional legislation and its historical precedents. The 1925 restriction on the right to board and search vehicles in the United States by its express language established as condition precedent to such boarding and searching that there exist probable cause that aliens were being illegally introduced into this country. This

requirement would indicate that the knowledge could only be derived by immigration officers at or in the immediate vicinity of the border. The 1946 limitation attains harmony with the Fourth Amendment if Congress, in excusing the probable cause requirement, carefully limited such authority to areas so immediate to the boundary line that a connection may be shown with a border crossing. "Reasonable distance" can vary with any interpretation,[8] and this Court in *Almeida-Sanchez* furnished flexibility with the concept of "functional equivalents" of the border where probable cause was not necessary in an area near and connected with the border. 413 U.S. 266, 273.

Justice Powell in his concurring opinion discussed the possibility of a warrant based upon the functional equivalent of probable cause at areas near the border. 413 U.S. 266, 283-285. Such interpretations permit border searches at places within the interior without probable cause, and "reasonable distance" could then

[8]The implementing immigration regulation states that reasonable distance "means within one hundred air miles from the external boundary of the United States or any shorter distance" (8 C.F.R. 287.1(a)(2)). That same regulation also provides that the I.N.S. Commissioner may declare a distance in excess of one hundred miles to be reasonable (8 C.F.R. 287.1(b)). The creation of such an unrestrained authority is surely inconsistent with the general scheme of Congressional regulation which carefully circumscribed the power to arrest without warrant for violation of the immigration laws (subsection (1) and the power to arrest without warrant for felonies (subsection (3). Congress conditioned those powers upon the common law requirement of probable cause *and* the additional requirement that there be a "likelihood of the person escaping before a warrant can be obtained for his arrest."

be construed to co-extend with those situations. The Congressional language is given effect, and the Fourth Amendment is not violated.

The legislative history of the 1946 amendment concerning the broadening of the power of immigration officers to board and search vehicles is contained in one sentence of a letter of Attorney General Francis Biddle dated 10 February 1945 to the Chairman, Committee on Immigration and Naturalization which stated:

> "In the enforcement of the immigration laws it is at times desirable *to stop and search* vehicles within a reasonable distance from the boundaries of the United States *and the legal right to do so should be conferred by law.*" H.R.Rep. No. 186, 79th Cong., 1st Sess. 2 (1945).[9] (Emphasis added).

The statutory language continues the reference to "board and search," notwithstanding the Attorney General requested the power to "stop and search vehicles." The concept of boarding a vehicle inherently implies the absence of motion.[10] Where there exists an inconsistency between the desired intent of the Attorney General and the language used by Congress, the plain wording of Congress should control. Although a technical distinction can be made between "boarding" and "stopping," the most important consideration is that Congress did not confer upon Border Patrol agents

[9]1946 U.S. Code Cong. Service, 1414-1415.

[10]*Websters New World Dictionary of American Language* (2d College ed. 1972) defined the verb "board" "to get on (a train, bus, etc.)." The historical reference to coming along side a ship to board with a hostile purpose does not appear applicable to a vehicle.

the power to stop moving vehicles well within the United States.

This legislation again reveals the very limited context in which Congress permitted these carefully circumscribed invasions of privacy of an individual without a warrant. In light of the general scheme, it is difficult to argue for such open-ended powers now requested by the petitioner.

The Immigration and Nationality Act of 1952 (66 Stat. 163) was a comprehensive revision of the Immigration, Naturalization, and Nationality Codes. Although the petitioner places the emphasis of immigration officers' right to stop and interrogate under section 287(a) (8 U.S.C. 1357(a)), the basic authorization for inspection by immigration officers is in section 235(a) (8 U.S.C. 1225(a)).[11] This now controlling statute, section 235(a), also empowers immigration officers to board and search vehicles, but it is restricted

[11]Section 235(a) provides in part: "Immigration officers are hereby authorized and empowered to board and search any vessel, aircraft, railway car, or other conveyance, or vehicle in which they believe aliens are being brought into the United States. The Attorney General and any immigration officer, including special inquiry officers, shall have the power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this Act and administration of the Service, and, where such action may be necessary, to make a written record of such evidence." 66 Stat. 198-199. This section continues to today the inspection authority Congress granted in 1891 *supra*. Cf. *Almeida-Sanchez*, dissenting opinion of Justice White, 413 U.S. 266, 292.

by the requirement that these officers possess the personal belief that aliens are being brought into the United States. The statutory language requires direct or indirect personal knowledge of immigration officers that aliens are in the process of being brought into the United States. The phrase "being brought into the United States" requires proximity to the border or a functional equivalent and a basis of belief by immigration officers as to particular vehicles. The legislative history, H.R.Rep. 1365, 14 Feb. 1952, in the analysis of the 1952 legislation consolidates section 235 (Chapter 4) and section 287. Concerning the authority to question under section 235, the House Report states:

> "Any person coming to the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain, whether or not he intends to remain permanently, whether, if an alien, he intends to become a citizen, and such other information as will aid the immigration officers in determining whether the person is a national of the United States or an alien, and, if the latter, whether he is subject to exclusion under any of the provisions of the bill. *It is not intended by this provision to sanction the indiscriminate questioning or harrassment of citizens returning to the United States, but it is to be used by the immigration officers whenever there is reason to believe that the citizen is violating or about to violate the law and is about to become expatriated.*[12] (Emphasis added).

[12]H.R. Rep. 1365, 82d Cong. 2d Sess. 54-55 (1952); 1952 U.S. Cong. and Adm. News, 1709-1710. The earlier Senate Report on the same provision declared: "In conjunction with their inspection of aliens, the bill authorizes the immigration

If the right to question at the border was intended to be so narrowly circumscribed to a situation where immigration officers were to have probable cause to believe that the person was violating or about to violate the law, with how much greater force does such a requirement exist at a substantial distance from the border on a heavily travelled highway?[13]

When section 287(a) and section 235(a) are compared, there is some overlap. Section 235(a) provides the general authorization which is the principal power allotted to immigration officers to inspect persons who might be aliens and is the basic citation of authority. Although the section 287(a) exceptions to the requirement for a warrant are enumerated, they cannot be logically construed to be the basis of an unlimited power to interrogate any person anywhere in the United States.

Section 287(a)(1), 8 U.S.C. 1357(a)(1), provides:

officers to board and search vessels, aircraft, railway cars or any other conveyance or vehicle in which they believe aliens are being brought into the United States. Under similar language in S. 716, immigration officers would be empowered to search such conveyances in which they believe or suspect aliens are being brought into the United States, but since some question was raised as to the effect of the word "suspect," it has been eliminated in the bill. *However, the change is not intended to restrict or limit in any way the existing authority of appropriate immigration officers to conduct such searches upon the basis of probable cause.*" S. Rep. 1137, 82d Cong. 2d Sess. 27 (1952). (Emphasis added).

[13]In the same analysis there is only a brief general reference to section 287. H.R.Rep. 1365, 82d Cong. 2d Sess. 55 (1952); 1952 U.S. Cong. and Adm. News, 1710.

> "To interrogate any alien or person believed to be an alien as to his right to be or remain in the United States."

The statute excuses the requirement of a warrant for such interrogation if there exists a justifiable basis for interrogation. The petitioner contends that this statute permits questioning of any person *any place* and further that it permits the interdiction of traffic to accomplish this result despite the statute's lack of reference to the authority of immigration officers "to forcibly stop traffic" so as to interrogate occupants of vehicles travelling within the interior of the United States. This statutory authorization is further restricted to questioning of "aliens" (implying actual knowledge) or "person believed to be an alien" (Implying probable cause). Respondent submits that this statute when read in conjunction with *Carroll and Almeida-Sanchez*, absent a warrant, requires that the immigration officer have probable cause to believe that an occupant of a vehicle is an illegal alien before he has the authority to stop it and question the occupant. In this case, the immigration officer, believing the occupants appeared to be of Mexican descent, did not have probable cause or founded suspicion to believe that these persons were aliens. There are too many American citizens of Mexican descent in Southern California to give any credence to such claim. *United States v. Mallides*, 473 F.2d 859, 860 (9th Cir. 1973).

B. Terry v. Ohio, 392 U.S. 1 (1968), does not authorize, in the absence of probable cause, a warrantless forcible stop of an automobile travelling on a highway a substantial distance from the border.

The vehicle of the respondent was forcibly stopped on an interstate highway over 60 miles from the Mexican border and the occupants interrogated by armed Border Patrol agents because they believed these people appeared of Mexican descent. The regularly established checkpoint was closed, and the Border Patrol officers pursued and stopped the vehicle of respondent during the hours of darkness. When the stop was made, one officer took a position to provide protection to the other. (A. 7).

This stop on the highway was a "seizure" of the vehicle and the occupants therein within the meaning of the Fourth Amendment.[14] *Henry v. United States*, 361 U.S. 98, 103 (1959) (a car travelling on a street in Chicago); *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (a person walking down the street in Cleveland). This Court in *Terry, supra*, held: "It must be recognized that whenever a police officer accosts an individual and

[14]The reference to a so-called "automobile exception" has been in terms of excusing the *warrant* requirement, cf. *Cardwell v. Lewis*, 417 U.S. 583, 589-590, 597 (1974), but this Court has held that nothing less than probable cause is necessary to stop a vehicle. *Carroll v. United States*, 267 U.S. 132, 153-154 (1925); *Henry v. United States*, 361 U.S. 98, 104 (1959); *Almeida-Sanchez v. United States* 413 U.S. 266, 272, 274-275. Justice Powell's concurring opinion in which he joined the majority did suggest the possibility of something less than probable cause but then only pursuant to a warrant. 413 U.S. 266, 277-285.

restrains his freedom to walk away, he has 'seized' that person." 392 U.S. 1, 16; and further stated: "We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search.'" 392 U.S. 1, 19. The person driving an automobile on an interstate highway has an expected right of uninterrupted freedom of movement and the right to be let alone.

Both fundamental rights are protected by the Fourth Amendment. The Government must justify its interference. It did not do so. Although this Court in *Terry, supra*, permitted the intrusion to stop an individual on the street upon something less than probable cause, the Court required an *objective* standard based upon articulable facts that could be later presented to a neutral judge to assure that the intrusion was reasonable under its peculiar circumstances. Chief Justice Warren speaking for the Court in *Terry* stated:

> "And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts

available to the officer at the moment of seizure or the search 'warrant a man of reasonable caution in the belief' that the action was appropriate?"[15] 392 U.S. 1, 21-22.

Although less than probable cause might be enough in some circumstances, the particular intrusion must be justified by specific factual circumstances. The Court especially eschewed stops based upon hunches or unfair generalizations:

"Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more than inarticulate hunches, a result this Court has consistently refused to sanction."[16] 392 U.S. 1, 22.

The experienced police officer's studied observations of three men believed to be "casing" a downtown store for an armed robbery justified the stop for further inquiry in *Terry*.[17] The Border Patrol officers had less

[15]The Court also described the basis for the stop as "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot." 392 U.S. 1, 30. (Emphasis added).

[16]*See also* 392 U.S. 1, 27.

[17]The facts in *Terry* did not formally resolve the issue of the officer's right to interrogate the suspect, even though Justice White in his concurring opinion states that questioning would be appropriate but the suspect need not answer or be commpelled to answer. 392 U.S. 1, 33-34. If the Border Patrol officer can compel the stop, then some admonition by the officer is necessary to apprise the occupants that he could not compel them to talk. Advice of rights should not be limited to a formal arrest, cf. 8 C.F.R. 287.3, but given where there is deprivation of a freedom of action in a significant way. *Miranda v. Arizona*, 384 U.S. 436, 477 (1966).

than a hunch, a racial or ethnic bias, to support their stop of respondent's vehicle. The Court of Appeals consistent with its own precedent[18] adhered to the teachings of *Terry* and required that the Border Patrol agents who before they stop a vehicle must "possess facts" which constituted a founded suspicion that he or his passengers were illegal aliens. 499 F.2d 1109, 1112.[19] The holding and reasoning of *Terry*,[20] which was interruption of the movement of a person on a street, supports the conclusion of the Court of Appeals; however, the respondent submits that when federal officers seek to stop a moving vehicle on the highway, especially by a roving patrol, probable cause is required

[18]*Wilson v. Porter*, 361 F.2d 412 (9th Cir. 1966).

[19]The respondent contends that under *Carroll* and its progeny through *Almeida-Sanchez*, a stop must be based upon not less than probable cause, especially in light of the legislative history designed to prevent harrassment by immigration officers. See 1952 *Cong. & Adm. News* 1709-1710, n. 12 *supra* pp. 23-24). To sustain the position of the Court of Appeals, that issue need not be reached.

[20]*Adams v. Williams*, 407 U.S. 143 (1972), is consistent with the founded suspicion rationale and held: "A brief stop of a *suspicious* individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the *facts* known to the officer at the time." 407 U.S. 143, 146. It should be noted that in *Adams* it was a parked car which did not require the interruption of moving motor vehicle traffic. Also in *Terry* the intrusion of an on-the-street encounter in public is less burdensome than the stopping and pulling of a vehicle off the highway.

for such stop. The Court of Appeals unanimously held that a lesser standard of "founded suspicion" was necessary but lacking. Although probable cause is and should be the standard for such a stop, the failure of the Government to satisfy even the lesser standard serves to sustain the action of the Court of Appeals.

C. The roving Border Patrol stop of vehicle on a major highway over sixty miles from the Mexican border cannot be justified under the concept of "area-wide equivalent of probable cause," especially in the absence of a warrant.

1. The area-wide equivalent of probable cause does not justify stops in the area of the Mexican border.

The petitioner questions but does not dispute the stop as a roving patrol stop (Brief for Pet. 8, n.3), as found by the decision of a *unanimous en banc* Court of Appeals. 499 F.2d 1109, 1110. This Court always gives great weight to the factual determinations of a Court of Appeals familiar with the problem peculiar to its jurisdiction. *Cf. Hamling v. United States*, 418 U.S. 87 (1974). Since the checkpoint was not operational, these Border Patrol officers reverted to the type of patrol expressly condemned in *Almeida-Sanchez*.

There was neither probable cause for the stop,[21] nor a warrant to authorize the roving patrol. Faced with

[21] Also, the Government does not contend there was "founded suspicion" or "reasonable factual circumstances" for the stop.

these facts, the petitioner is forced, of necessity, to propose an innovational exception to the well-established requirements of the Fourth Amendment regulating the activities of law enforcement officers in the seizure of persons and automobiles.

The "area-wide equivalent of probable cause" proposed by the Government is not defined, but referred to generically as "in the area of the Mexican border." (Brief for Pet. 9, 13, 21). The ambiguity of the term implies an unrestrained, and in this case undefinable, power in the hands of federal officers that the Fourth Amendment was adopted to eliminate.[22]

The Government's reliance on *Camara v. Municipal Court*, 387 U.S. 523 (1967), is misplaced.[23] In evaluating the application of *Camara* to this case, the following factors should be considered: (1) the purpose of the intrusion, (2) the nature of the intrusion, (3) the area covered, (4) the number of persons affected, (5) the legislative or administrative safeguards, (6) the history of the practice, (7) other alternatives, and (8)

[22] Speaking to the authority to search a commercial warehouse, this Court in a similar vein stated, "But the decision to enter and inspect will not be the product of the unreviewed discretion of the enforcement officer in the field." *See v. City of Seattle*, 387 U.S. 541, 545 (1967).

[23] The respondent recognizes that five members of this Court rejected in *Almeida-Sanchez* a similar Government-suggested non-warrant application of *Camara* (413 U.S. 266, 270, 277-285) as well as the Government's reliance on the detailed statutory regulation of business cases, *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), and *United States v. Biswell*, 406 U.S. 311 (1972) (413 U.S. 266, 270-271, 280-281), but presents additional reasons why the Government's reliance on *Camara* is inappropriate.

the procedure as criminal or administrative. Most of these points are treated or referred to in *Camara* or its companion case of *See v. City of Seattle*, 387 U.S. 541 (1967).

(1) The purpose of the ordinance in *Camara* was to enforce health regulations and in *See* to enforce fire inspection regulations. The purpose of the immigration roving patrol stops and inspections is to arrest and prosecute those transporting illegal aliens into the United States. *Camara* and *See* belong in a category of the first order of society's fundamental right of self-preservation,[24] whereas the influx of people from foreign countries, not regulated prior to 1862, is not inherently hazardous to a community or state.[25] For example, certain illegal aliens with familial ties in the United States have a defense to deportation. Cf. 8 U.S.C. 1251(f). (2) The nature of the intrusion is significant where the officers at their whim may curb a moving vehicle or demand the occupants account for

[24]See dissenting opinion of Justice Clark to *Camara* and *See*, 387 U.S. 541, 546-555.

[25]The Statue of Liberty dedicated in 1886 contained an invitation to exiles from other lands:

> "Give me your tired, your poor,
> Your huddled masses, yearning to breathe free,
> The wretched refuse of your teeming shore.
> Send these, the homeless, tempest-tost to me,
> I lift my lamp beside the Golden Door!"
> (Emma Lazarus, "The New Colossus.")

Efforts of society against sickness and poverty should not be limited to aliens. Any threat to the employment opportunities of citizens is best answered by laws proscribing employment of illegal aliens. See *United States v. Ortiz*, No. 73-2050, Brief for Resp. 34-35.

their right to be in the United States.[26] Authority to inspect buildings is of a much lower order. (3) *Camara* and *See* involved periodic inspections within a city, but here the Government seeks justification for its practice "in the area of the Mexican border." In *Camara* and *See*, the Court had also spoke in terms of more limited areas as the subject matter of search warrant. (4) Property owners within a designated city, much like the business proprietors in *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), and *United States v. Biswell*, 406 U.S. 311 (1972), are a limited group fixed in location, but in the instant case, the Government seeks authority to regulate all highway traffic in the area of the Mexican border.[27] (5) *Camara* referred to "reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling," 387 U.S. 523, 538, but no such specific limitations have been announced for immigration officers. Congress has passed no legislation to stop traffic. The power to interrogate aliens is

[26]The American born, Spanish speaking, citizen might find it difficult to prove his citizenship. The INS estimate of a stop for questioning at a checkpoint at "no more than about 5 seconds per occupant" (Brief for Pet. 25) is inconsistent with senior Border Patrol Agents in the field who state that the average car is detained for questioning "approximately three to five minutes." *United States v. Ortiz*, No. 73-2050, Brief for Resp. Appendix p. 5a. The duration is solely within the power of the officer.

[27]Near where respondent was stopped, it has been estimated that 10,000,000 vehicles (and certainly more than that number of people) pass the checkpoint annually. See *United States v. Ortiz*, No. 73-2050, Brief for Resp. 13, n. 4.

recognized, but it cannot be argued that Congress left totally unfettered the right of the immigration officer to interrogate a person he subjectively believes to be an alien. 8 U.S.C. 1357(a)(1). The Congressional requirement for a belief that the person is an alien is more properly consistent with the requirement of probable cause. Such interrogations must be supported by objective articulable facts that would lead a prudent immigration officer to believe that the person was an alien and violating the law.[28] (6) Although the right of cities to protect their health and safety has been recognized since time immemorial, the questionable immigration practice of stopping vehicles was initiated in 1927 but operated without statutory or court approval. In 1946 the Attorney General requested the power "to stop," but the Congress adhered to its previous standard limited "to board." This practice received no public acceptance and was contrary to the legal principle announced in *Carroll.* (7) It is practically impossible to check for fire or health hazards without an inspection of buildings, but alienage can be determined at any point the alleged alien has regular contacts with business or governmental activities involving registration, i.e. driving, owning a vehicle, attending school, voting, receiving welfare or unemployment benefits, marrying, and working in the government employ.[29] (8) A key aspect of *Camara* in

[28]This suggestion is similar to the one set out in the legislative history for interrogations *at the border*. 1952 U.S. Cong. and Adm. News 1710; H.R.Rep. 1365, 82d Cong. 2d Sess. 55 (1952).

[29]See *United States v. Ortiz*, No. 73-2050, Brief for Resp. 31-35 for additional alternatives and suggestions for detection and proper disposition of illegal aliens.

permitting something less than traditional notions of probable cause to justify the intrusion was the fact that these officers were not searching for evidence of criminal action, 387 U.S. 523, 530. This is precisely the object of immigration officers' searches–illegal entrant aliens punishable under 8 U.S.C. 1325[30] or persons unlawfully transporting them subject to a penalty of five years confinement or $2,000 fine, or both, for each alien. 8 U.S.C. 1324.[31] The characterization by Justice Powell (413 U.S. 266, 278, 279) that both *Camara* and alien invasions of privacy produce "evidence of crime" should permit the distinction that *Camara*-type penalties were minor, i.e. petty offenses. The Government's self-serving claim that only 3% of the illegal aliens apprehended are prosecuted is no effective answer, because the Government would then exclusively control the ability to determine whether their conduct is criminal or administrative. The best answer is that Border Patrol officers are armed; health and fire inspectors are not.[32]

[30]A second offender for the simple act of illegal entry is subject to a felony penalty: two years imprisonment or $1,000 fine, or both. 8 U.S.C. 1325.

[31]Although the INS is justifiably proud of its work in stemming the flow of drugs, see *United States v. Ortiz*, No. 73-2050, Brief for Resp. 29-30, like the customs officers within the interior of the United States they should possess facts amounting to probable cause to justify the stop of a vehicle moving on the highway. The restriction of the customs officers may create a potential for abuse by immigration officers.

[32]Another factual distinction is that there appeared to be "reasonable factual circumstances" or "founded suspicion" for the actions taken in *Camara* (improper residential use of ground floor, 387 U.S. 523, 527) and in *See* (living quarters in a locked warehouse, 387 U.S. 541, 549).

The transparency of the Government's argument regarding area-wide equivalent of probable cause is discernible through its clearly arbitrary application. It is supposed to be applicable "in the area of the Mexican border" but might not be applicable in New York City (Pet. Brief 16 n. 7, 20-21). The statute says "reasonable distance," 18 U.S.C. 1357(a)(3), and the regulation defines this term as "100 air miles," 8 C.F.R. 287.1(a)(2), with a provision that the INS Commissioner may exceed the 100-mile limit.[33] Although this language is overly broad, it may be strictly construed so as not to transgress the prohibitions of the Fourth Amendment. The application of such a novel concept of the Executive defining an area as the functional equivalent of probable cause poses a serious threat to the principle of equal protection of the law. Persons living in San Diego and Tucson are entitled to no less invasion of their rights than the people of New York and Boston.[34]

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[33]Although the petitioner has not limited "the area of the Mexican border," it is implied that the 100-mile limitation would be applicable.

[34]The Fourth Amendment was a response to the infamous writ of assistance. *Boyd v. United States*, 116 U.S. 616, 624-627 (1886). Ironically, the British writ requesting the authority to search for imported contraband limited its authority to the port of Boston. Gray, *Writs of Assistance*, appendix I, Quincy's Massachusetts Reports, pp. 404-405. Even today New York City is subject to INS "sweeps," which are stops for interrogation of persons concerning their right to be in the United States without warrant or probable cause. An INS memo on New York "sweeps" suggests that agents stop people if they have certain speech patterns, wear serapes, carry brown lunch bags, or other characteristics intuitively created by the agents. *Hearings Before the Subcommittee on Immigration, Citizenship, and International Law of the Committee of the Judiciary*, H.R. 93d Cong. 1st Sess., 32-35 (26 July 1973).

2. Without probable cause a warrant cannot be excused.

The thrust of *Camara*, even permitting "something less than probable cause" for an area inspection, subjugated such invasion of privacy to the requirement of a warrant. The suggestion by the Government that the area-wide equivalent of probable cause is sufficient absent advance judicial approval through the warrant procedure unduly stretches the dual requirement of both probable cause and a search warrant.

Assuming arguendo that the Government has established the area-wide probable cause for stops and interrogations, the Government, in the face of *Almeida-Sanchez*,[35] but with some support of the dissenting opinion[36] and the concurring opinion of Justice Powell,[37] again contends that neither a warrant nor probable cause are required. The elimination of either of these requirements should be exceptional, otherwise the exceptions swallow the rule.

The language giving rise to this contention arose in *Camara*, where the Court stated: "Since our holding emphasizes the controlling standard of reasonableness, nothing we say today is intended to foreclose prompt inspections, even without the warrant, that the law has

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[35]It appears at least a majority of the Court would permit the use of area search warrants, 413 U.S. 266, 270, 277-285, 288, but in the absence of a warrant probable cause is required. 413 U.S. 266, 274-275, 281.

[36]Neither warrant nor probable cause are necessary for stop and search of the automobile in Imperial County (rural county) 25 miles from border. 413 U.S. 266, 285-299. (Dissent)

[37]In certain limited circumstances, neither probable cause nor a warrant is required. 413 U.S. 266, 277.

traditionally upheld *in emergency situations.*" 387 U.S. 523, 539. The alien problem cannot fairly be treated as an emergency as compared to the seizure or destruction of unwholesome food, compulsory vaccinations, or health quarantines. It would follow that if warrants are required for general community health (*Camara*) and fire protection (*See*) inspections, they would certainly be necessary in determining the Government's ephemeral concept of area-wide equivalent of probable cause that is operable in only certain parts of the United States.[38]

The roving patrol, the subject matter in *Almeida-Sanchez*, could be reasonably regulated through a warrant, which for not longer than the specified 10-day period[39] could permit a designated patrol of certain routes in an appropriate area in the immediate or proximate vicinity of the border. The warrant would specifically detail the procedure for a stop and the questions to be asked. The specific time of day such patrol could be operated could also be limited. Such warrants are not beyond comprehension.[40] In the

[38]Although the concept of the functional equivalent of probable cause is unstructured, Justice Powell gave, in comparison to the Government's concept, substantial specificity in a four-point standard (413 U.S. 266, 283-284) neither referred to nor apparently relied upon by the Government. The respondent would contend that an answer to these four-points are constitutionally necessary before a court may even consider "area-wide equivalent of probable cause."

[39]Rule 41(c), Federal Rules of Criminal Procedure.

[40]See *United States v. Ortiz*, No. 73-2050, Brief for Resp. Appendix A. Although such warrants are conceptually feasible, they are not now authorized by statute or rule (*Cf.* Rule 41, Federal Rules of Criminal Procedure).

request for such warrants, the Border Patrol could support their showing of need by reference to the complementary and interrelated efforts of other patrols or checkpoints, which would also be the subject of warrant applications.

Reference to *United States v. United States District Court*, 407 U.S. 297 (1972), supports the respondent's position for the necessity of a warrant. If the listening by federal officers to a conversation–an invasion of privacy that may cause no physical intrusion (i.e. *Katz v. United States*, 389 U.S. 347, 354-359 (1967)) demands a warrant, then all the more reason exists to require a warrant to permit officers to forcibly stop a travelling vehicle and actively interrogate the persons as to their citizenship.

The reference to license checks of drivers of motor vehicles is not comparable to an alien check, for as the Court of Appeals *en banc* properly noted "there was no way for a police officer to determine that a driver had a valid driver's license permitting him to operate a motor vehicle other than by stopping him and asking him to produce his license." *United States v. Bowen*, 500 F.2d 960, 964 (9th Cir. 1974).[41] A highway user

[41]This is substantially quoted from one of the leading cases authorizing a traffic stop. *Lipton v. United States*, 348 F.2d 591, 593 (9th Cir. 1965). In *United States v. Croft*, 429 F.2d 884, 886 (10th Cir. 1970), the defendant had not been singled out for a check by the roadblock. In *Myricks v. United States*, 370 F.2d 901 (5th Cir. 1967), the court held the power limited to traffic checks. *See United States v. Ortiz*, No. 73-2050, Brief for Resp. 46-47, 54-56. *Cf. Commonwealth v. Swanger*, 453 Pa. 107, 307 A.2d 875 (1973), where founded suspicion was held necessary for a license check stop.

may reasonably foresee a minor intrusion to see the permit for driving a car. The failure to possess such license, a minor offense, is greatly outweighed by the compelling state interest to insure that only competent drivers use the highway. The random patrol stop is more arbitrary than the roadblock technique, but the nature of intrusions cannot be compared with alien traffic checks purposely designed to ferret out serious criminal wrongdoing. However, such intervention might more effectively be conducted at or in the immediate vicinity of the border.[42]

Both *Camara* and the concurring opinion of Justice Powell in *Almeida-Sanchez* establish the requirement for a search warrant to justify the forcible stop of a moving vehicle proposed by the Government. The distance from the border, sixty miles, of this patrol stop further exemplifies the need for the intervention of neutral judicial scrutiny.

D. Under the announced rules of this Court since *Weeks v. United States* testimonial evidence obtained in violation of the Fourth Amendment must be suppressed.

Although not discussed by petitioner, the respondent submits that the Fourth Amendment would require the suppression of the testimony of the occupants of respondent's vehicle produced by the unlawful stop of the vehicle and interrogation of the occupants. The

[42]A stop might be permissible at a functional equivalent such as an established checkpoint *near the border* at a confluence of two or more roads extending from the border. *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-273 (1973).

Court of Appeals made reference to the case of *United States v. Guana-Sanchez*, 484 F.2d 590 (7th Cir. 1973), for the suppression of this testimony, and this Court has granted certiorari in that case, No. 73-820.[43] 417 U.S. 967 (1974). The respondent contends that notwithstanding the disposition in *Guana-Sanchez*, the testimonial evidence of the alien witnesses, as well as the cross-examination of the respondent as to items taken at the time of his arrest, must be suppressed.

In *Guana-Sanchez*, the Government argues that the questioning of the passengers in the light of that case (i.e. police assistance to lost persons) was proper, and "[t]he alleged 'search' of the car is no part of the case as it reaches this Court."[44] Guana-Sanchez made no incriminating statements, and his arrest yielded no information pointing to a commission of an offense.[45] Here the respondent's statements to the alien witnesses of "Here comes the immigration." and "They busted us." were used against him. (Tr. 33, 70). The respondent was also cross-examined as to his Mexican money to show a nexus with Mexico, and the American money as the possible motive for his conduct. (Tr. 90). The stopping and interrogation of the vehicle respondent was driving clearly gave him standing to contest the fruits of that unlawful governmental intervention.

In *Weeks v. United States*, 232 U.S. 383 (1914), this Court erected a bar to the unlawful conduct of police

[43]The police officers initially questioned the occupants of a car *parked off the road* to see if they were lost. (No. 73-820, Appendix pp. 9-10).

[44]No. 73-820, Brief for Pet. 13.

[45]No. 73-820, Brief for Pet. 13-14.

officers engaged in invasions of privacy to insulate the judiciary from any participation, implied or otherwise, in the unconstitutional conduct of the Executive or his agents:

> "To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." 232 U.S. 383, 394.

A serious difficulty would arise if a fictional or arbitrary distinction were created and attempted so as to apply the exclusionary rule only where physical or tangible evidence (and not testimonial) was obtained as a result of police conduct in violation of the Fourth Amendment. What if government agents made an unlawful search and reviewed documents, but instead of photocopying them, merely had a skillful agent memorize them (possibly with the aid of notes). Then, at trial, when the records were shown to be unavailable, the testimony of the agent would be introduced as to the contents of the documents. This Court has already condemned such action in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920), and there stated:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court *but that it shall not be used at all.*" (Emphasis added).

A similar situation arose in *Nardone v. United States*, 308 U.S. 338 (1939), where the Government unsuccessfully contended they were free to make use of

evidence derived from unlawfully intercepted telephone conversations. In that case was born the concept "fruit of the poisonous tree." 308 U.S. 338, 341.

The more current authority of *Wong Sun v. United States*, 371 U.S. 471 (1963), is controlling. There this Court stated:

> "The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion. It follows from our holding in *Silverman v. United States*, 365 U.S. 505, that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects.' Similarly, testimony as to matters observed during an unlawful invasion has been excluded in order to enforce the basic constitutional policies. *McGinnis v. United States*, 227 F.2d 598. Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion. See *Nueslein v. District of Columbia*, 115 F.2d 690. Nor do the policies underlying the exclusionary rule invite any logical distinction between physical and verbal evidence. Either in terms of deterring lawless conduct by federal officers, *Rea v. United States*, 350 U.S. 214, or of closing the doors of the federal courts to any use of evidence unconstitutionally obtained, *Elkins v. United States*, 364 U.S. 206, the danger in relaxing the exclusionary rules in the case of verbal evidence would seem too great to warrant introducing such a distinction." 371 U.S. 471, 485-486.

The Fourth Amendment clearly extends to oral statements of the defendant, *Katz v. United States*, 389 U.S. 347, 353 (1967).

The question of the standing of respondent should commence with an examination of the charges, 8 U.S.C. 1324(a)(2), for which the respondent was convicted. The illegal object, or contraband named in each count, was an illegal alien passenger in respondent's car. (C.R. 1-2). The concept of transportation includes possession or control so that the requisite possessory interest in the object of the offense is satisfied. If the respondent's car contained an unregistered firearm, a controlled substance, untaxed liquor, could the Government contend that respondent did not have standing? The stop and invasion of the respondent's automobile and these particular federal charges in which the seized and interrogated aliens were named, gave respondent standing. The decision in *Alderman v. United States*, 394 U.S. 165 (1969), offers further support for there the owner of the premises had standing to challenge the third-party conversations overheard by an invasion of his premises. Here, the invasion of the respondent's vehicle gave rise to the testimony of these witnesses against him. The words of Justice Clark, in another case where the Government contended that the respondent did not have the required standing, are apropos:

> "To hold that this search and seizure were lawful as to the respondent would permit a quibbling distinction to overturn a principle which was designed to protect a fundamental right."[46]

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[46] *United States v. Jeffers*, 342 U.S. 48, 52 (1951).

E. *Carroll* and its progeny, as well as established Ninth Circuit precedent, eliminate the issue of "retroactivity."[47]

Since *Carroll*, this Court has maintained an unbroken chain of precedent requiring probable cause to stop and search a moving vehicle, thus *Almeida-Sanchez* did not establish a "new rule."[48] In *Henry v. United States*, 361 U.S. 98 (1959), federal agents, having information amounting to "founded suspicion," but not probable cause, waved a car to a stop and were denied the fruits of that stop and search. Although the Government contends that the combination of *Camara* and *Terry* justify this roving patrol stop and interrogation, this Court has neither overruled nor deviated from the rule announced in *Carroll* and reiterated in subsequent cases.

Other related cases now before this Court involved a re-evaluation of 8 U.S.C. 1357(a)(3) by the Court of Appeals, but the Ninth Circuit in its first impression case involving 8 U.S.C. 1357(a)(1), relying on well-established circuit authority,[49] unanimously held that at least "founded suspicion" was required for this stop

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[47] If the issue of "retroactivity," or other arguments presented in Part I of the argument is decided against the respondent, the respondent would contend that Part II of the argument, *infra*, still presents an independent basis to support the reversal of his conviction by the Court of Appeals.

[48] Respondent would adopt and incorporate by reference *United States v. Ortiz*, No. 73-2050, Brief for Resp. 70-83.

[49] *United States v. Mallides*, 473 F.2d 859, 861 (9th Cir. 1973); *United States v. Ward*, 488 F.2d 162, 168-169 (9th Cir. 1973).

and interrogation. This case was controlled by pre-existing Supreme Court and Ninth Circuit authority.[50]

II.

THE FORCIBLE STOP AND INTERROGATION OF PERSONS TRAVELLING ON A HIGHWAY WHO APPEAR TO BE OF MEXICAN DESCENT WAS AN UNLAWFUL SEIZURE THAT CONSTITUTED INVIDIOUS DISCRIMINATION BASED ON RACE, ANCESTRY, OR NATIONAL ORIGIN WHICH REQUIRES THE SUPPRESSION OF THE RESULTANT EVIDENCE OR DISMISSAL OF THE CRIMINAL ACTION UNDER THE FOURTH AND FIFTH AMENDMENTS.

The Border Patrol agents candidly articulated their intention and purpose in forcibly stopping respondent's moving vehicle over sixty miles north of the border. The cross-examination of Border Patrol Agent Brady revealed:

> "Q. Did these people inside the car appear to be of Mexican descent to you?
> A. Yes, sir.
> Q. And that, if there was any, appeared to be the reason that you stopped them?
> A. Yes, sir." (A. 9).

[50]If warrantless stops are held unlawful, it is hoped this Court will follow the suggestion of the Government that the respondent should be given the benefit of the new rule. Brief for Pet. 9, n. 4.

Because the Court of Appeals held that the observation of the occupants as non-white or of Mexican descent did not constitute founded suspicion to justify the stop for illegal aliens, it did not have to reach the issue whether the Border Patrol agents have the authority to conduct such forcible stops of traffic for interrogation of persons as to possible alienage. Assuming such a power was found, the respondent would contend that the invidiously discriminatory manner in which it was exercised in the instant case requires either suppression of the resultant evidence or dismissal of the criminal charges against this defendant. The stop of the vehicle constituted a seizure of the vehicle in violation of the Fourth Amendment. *See Henry v. United states, supra.* However, this issue involving racial or ethnic discrimination rests more properly under the Fifth Amendment Due Process Clause. The Fifth Amendment contains no specific equal protection clause as the Fourteenth Amendment, but it forbids to federal authorities discrimination that is so unjustifiable as to be violative of due process. *Shapiro v. Thompson*, 394 U.S. 618, 641-642 (1969); *Schneider v. Rusk*, 377 U.S. 163, 168 (1964). This Court twenty years ago declared that the Constitution of the United States forbids discrimination by the Federal Government and its agents against an individual because of race. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

The right to travel on the highways unimpeded without interference from federal agents was recognized in a Fourth Amendment context in *Carroll v. United States*, 267 U.S. 132, 153-154 (1925), and repeated in

Almeida-Sanchez v. United States, 413 U.S. 266, 274-275 (1973). The right of free travel in the interior of the United States is fundamental and has roots over 100 years old. In the *Passenger Cases*, 48 U.S. 282, 492 (1849), Chief Justice Taney stated:

> "We are all citizens of the United States; and as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own states."

In *United States v. Guest*, 383 U.S. 745, 758 (1966), this Court held:

> "Although the Articles of Confederation provided that 'the people of each state shall have free ingress and regress to and from any other State,' that right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution."

This fundamental right of travel was again recognized in *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969). Persons travelling in an automobile on the highway have inherent expectations of privacy—a right to be "left alone"—but if there is an intrusion that the travelling public may be forced to accept, such governmental action must be applied with an even hand. Invasion of privacy because a person appears to be of Mexican descent is not justified, and such an intrusion should not be tolerated by this Court. Persons appearing of

Mexican descent constitute an identifiable group or separate class so as to support a charge of invidious discrimination and are under the protection of equal protection or due process of the laws. *Hernandez v. Texas*, 347 U.S. 475, 479 (1954); *White v. Regester*, 412 U.S. 755, 767-770 (1973).

Assuming that the Government has discretion to stop without cause a vehicle and interrogate occupants under 8 U.S.C. 1357(a)(1) or (3), that power cannot be exercised to discriminate against persons appearing of Mexican descent.[51] The principle upon which respondent requests relief was stated long ago in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), where the Court held:

> "Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as to practically make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution." 118 U.S. 356, 373-374.

The petitioner in *Yick Wo* had been sentenced to jail for ten days by a police judges court for violation of a city ordinance. Although his writ of habeas corpus to the California Supreme Court was unsuccessful, this Court granted relief. There, the discrimination was on racial lines. Chinese had been denied applications to conduct a laundry business, while Caucasians had been

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[51] For the average person, this concept of appearance would be difficult to define. Physical characteristics might include dark skin and black hair, but there are persons in the Republic of Mexico who have fair skin and light hair.

granted the privilege. The law was neutral on its face, but was applied against those of Chinese ancestry. This Court held that the discretion of Government agents was limited by the principles of law. Government agents were subject to the law and were not permitted to deny one's liberty merely because they chose to do so.[52] The case antedating *Yick Wo* was *Chy Lung v. Freeman*, 92 U.S. 275 (1876), where the Court struck down the authority of a California Commissioner of Immigration empowered to go aboard ships and inspect foreigners for "lewd and debauched women." The Commissioner was to receive a fee for such examination and a fee for a bond. Although the statute was neutral on its face, it was applied to subjects of the Emperor of China. Justice Miller found the unfettered power of such an immigration inspector to be obnoxious, unlawful, and questioned how this law might be applied to subjects of other countries.[53] In *Hernandez v. Texas*,

[52]"But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of laws and not of men.' For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." *Yick Wo v. Hopkins*, 118 U.S. 356, 370.

[53]Justice Miller asked, "Or if this plaintiff and her 20 companions had been the subjects of the Queen of Great Britain, can anyone doubt that this matter would have been the subject of international inquiry, if not a claim of redress?" 92 U.S. 275,

supra, the Texas system of selecting grand and petit jurors by the use of the jury commissioners was fair on its face and capable of being utilized without discrimination, but relief was still available because the system was susceptible to abuse and was employed in a discriminatory manner. 347 U.S. 475, 478-479.

More recently in *Oyler v. Boles*, 368 U.S. 448 (1962), Justice Clark speaking for the Court stated:

> "Moreover, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, *it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.*" 368 U.S. 448, 456 (Emphasis added).

Today, we look back with regret at the Governmental practices in the regulation and control of Chinese persons at the turn of the nineteenth century or those of Japanese ancestry during World War II. It is hoped that those who might be grouped as of apparent Mexican descent, illegal aliens, lawfully admitted permanent residents, Mexican aliens, and Mexican-Americans, and others who might have physical characteristics allegedly attributable to a person of Mexican descent, would not be singled out as the object of this Border Patrol stop and interrogation procedure.

279. What would our State Department do if the Border Patrol only stopped vehicles in which the occupants appeared of Russian or Slavic descent? How would our newly restored diplomacy with the People's Republic of China be affected if INS stopped only persons of Chinese descent?

Yick Wo serves as an example of discrimination against the Chinese laborer who sought to work in the laundry business. In *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943), this Court stated: "Distinctions between citizens solely based on their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[54] The concurring opinion of Justice Murphy in that case has even greater application today:

> "Distinctions based on color and ancestry are utterly inconsistent with our traditions and ideals. They are at variance with the principles for which we are now waging war. We cannot close our eyes to the fact that for centuries the Old World has been torn by racial and religious conflicts and has suffered the worst kind of anguish because of inequality of treatment for different groups. There was one law for one and a different law for another. Nothing is written more firmly into our law than the compact of the Plymouth voyagers to have just and equal laws. To say that any group cannot be assimilated is to admit that the great American experiment has failed, that our way of life has failed when confronted with the normal attachment of certain groups to the land of their forefathers. As a nation we embrace many groups, some of them among the oldest settlements in our midst, which have isolated themselves for religious and cultural reasons." 320 U.S. 81, 110-111 (1943)[55]

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[54]Quoted in *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

[55]The State of California was acquired after a war with Mexico, and since Mexico is contiguous to the United States, it is only natural that persons of Mexican descent or lawfully admitted resident Mexican aliens should reside in an area near their former familial roots.

In *Korematsu v. United States*, 323 U.S. 214 (1944), the defendant, an American citizen of Japanese ancestry, was convicted for remaining in a designated military area in San Leandro, California. Although the Court justified the action because of the military situation which was characterized as the "gravest eminent danger to public safety," it is doubtful that such racially oriented governmental actions could be justified today.

Even if the person is an alien, he is still protected by the Constitution of the United States. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). This Court in recent years has held that aliens may not be denied welfare benefits, *Graham v. Richardson*, 403 U.S. 365 (1971), the opportunity to take competitive civil service positions, *Sugarman v. Dougall*, 413 U.S. 634 (1973), and the opportunity to practice law, *In re Griffiths*, 413 U.S. 717 (1973).[56] These cases highlight the fact that even a person *determined* to be an alien has protection, but in the instant case, prior to the Border Patrol agent stopping the car, their subjective determination was not that of *alienage* but the individuals appeared to be of Mexican descent. This important distinction was highlighted in the recent case of *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973). In that case a lawfully admitted resident alien from Mexico was not hired because she was an alien. This Court held that the employers discrimination was not because of her "national origin." 42 U.S.C. 2000e-2(a)(1). The company had in fact accepted

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[56]See also *Takahashi v. Fish Comm'n*, 334 U.S. 410 (1948).

persons of Mexican origin, and this Court held that this federal statute did protect aliens from unfair discrimination and that it would have been unlawful for an employer to discriminate against aliens because of race, color, religion, sex, or national origin—for example, by hiring aliens of Anglo-Saxon background, but refusing to hire those of Mexican or Spanish ancestry. 414 U.S. 86, 95. So also it would be invidious discrimination if Border Patrol agents were to stop only those who appeared to be of Mexican ancestry, but did not interfere with the right of travel of those who appeared to be of Anglo-Saxon background.

Under the principles of *Davis v. Mississippi*, 394 U.S. 721 (1969), the evidence adduced as as result of the stop of respondent's vehicle and interrogation of the occupants of that vehicle should be suppressed under the Fourth Amendment. *Yick Wo* obtained his freedom by writ of habeas corpus, and this Court ordered him discharged from custody and imprisonment. 118 U.S. 356, 374. This defense was also recognized in *Two Guys v. McGinley*, 366 U.S. 582, 588 (1961).[57]

Justice Murphy dissenting in *Korematsu v. United States*, *supra*, indicated that the evacuation was not so much due to a war time emergency but rather racial antagonism. He stated:

[57]This defense has also been recognized by the Courts of Appeals. See *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972); *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973) (*en banc*); *United States v. Crowthers*, 456 F.2d 1074, 1080 (4th Cir. 1972); *Shock v. Tester*, 405 F.2d 852, (8th Cir. 1969); *Washington v. United States*, 401 F.2d 915, 924 (D.C. Cir. 1968).

> "The reasons appear, instead, to be largely an accumulation of much of the misinformation, half-truths, and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices—the same people who have been among the foremost advocates of the evacuation." 323 U.S. 214, 239.

The institution by the Border Patrol of such racially oriented controls over Mexican and Mexican-Americans follows the perspicacious prediction of Justice Murphy:

> "To give constitutional sanction to that inference in this case, however well intentioned may have been the military command on the Pacific Coast, is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow." 323 U.S. 214, 240.

Then it was a wartime emergency which ostensibly justified the action taken. The Border Patrol, which has many other procedures or methods to control illegal alien traffic,[58] should be affirmatively denied the racially discriminatory technique. Since respondent's vehicle was stopped by virtue of this unconstitutional discrimination, his conviction must be reversed and the charges ordered dismissed.

[58]Note 29, *supra*.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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